91-194

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

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State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Civil No. 900257

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Benny A. Graff, Judge.

REVERSED.

Opinion of the Court by VandeWalle, Justice.

Nicholas J. Spaeth, Attorney General, Bismarck, for plaintiff, appellant and cross-appellee.

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State v. Quill Corporation
Civil No. 900257

VANDEWALLE, Justice.

The State of North Dakota appealed from a district court summary judgment declaring that subsections (6) and (7) of Section 57-40.2-01, N.D.C.C., are unconstitutional as applied to Quill Corporation [Quill], and that the State therefore may not require Quill to collect and remit use tax on its sales to North Dakota consumers. Quill cross-appealed from that part of the summary judgment dismissing its action under 42 U.S.C. § 1983 and denying attorney's fees under 42 U.S.C. § 1988. We hold that Section 57-40.2-01, N.D.C.C., is constitutional as applied to Quill and accordingly we reverse the summary judgment.

I

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Quill sells office supplies, stationery, and equipment, offering over 9,500 different products ranging from paper clips to computers. Its annual sales are in excess of $200,000,000.

Quill solicits business through its numerous catalogs and flyers, advertisements in nationally distributed "card packs," advertisements in national periodicals and trade journals, and telephone solicitation of current customers. Of the more than 200,000 orders Quill receives monthly, approximately one-half are by telephone. The remaining half are received by mail, fax, telex, and by direct computer contact.

Quill's annual sales to nearly 3,500 active[1] North Dakota customers are just under $1,000,000. By sales volume, it

[1] Quill describes an "active" customer as one who has purchased from Quill within the past 24 months.

is the sixth largest seller of office supplies in North Dakota. Quill each year mails over 60 different catalogs and flyers to its North Dakota customers. This amounts to more than 230,000 separate pieces of mail, weighing over 24 tons, sent into the State annually by Quill.

North Dakota imposes a use tax upon property purchased for storage, use, or consumption within the State. Section 57-40.2-01, N.D.C.C. The rate is equivalent to the corollary sales tax. See Sections 57-39.2-02.1 and 57-40.2-02.1, N.D.C.C. A credit is given if sales or use taxes have been paid to another state upon the same property. Section 57-40.2-11, N.D.C.C.

Although the consumer is ultimately responsible for the tax, a "retailer maintaining a place of business in this state" is required to collect the tax from the consumer and remit it to the State. Section 57-40.2-07, N.D.C.C. Section 57-40.2-01, N.D.C.C., defines "retailer" and "retailer maintaining a place of business in this state":

> "6. 'Retailer' includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter . . . . A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.
>
> "7. 'Retailer maintaining a place of business in this state', or any like term, means any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state . . . . It also includes every person who engages

> in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property."

Section 81-04.1-01-03.1(3) of the North Dakota Administrative Code defines "regular or systematic solicitation" as "three or more separate transmittances of any advertisement or advertisements" during a specified twelve-month period.[2]

Quill has refused to collect and remit use taxes on goods purchased and used by Quill's customers in North Dakota. The State, through its Tax Commissioner, commenced this declaratory judgment action under Chapter 32-23, N.D.C.C., seeking a declaration that Quill is a "retailer" and a "retailer maintaining a place of business in this state" which must collect and remit the applicable use tax on its sales to customers in this State.

Quill answered, alleging that Chapter 57-40.2, N.D.C.C., as applied to Quill, is violative of the Due Process Clause and Commerce Clause of the United States Constitution as interpreted in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). Quill filed a counterclaim seeking relief under

[2] Section 81-04.1-01-03.1, N.D.A.C., inexplicably states that the definitions therein apply to subsection 5 of Section 57-40.2-01, N.D.C.C. However, the definitions in the Administrative Code section have no logical relationship to subsection 5, and it is therefore apparent that this is an erroneous reference. The parties have not raised this as an issue.

42 U.S.C. § 1983 for alleged violations of its Due Process and Commerce Clause rights, and seeking attorney's fees under 42 U.S.C. § 1988.

On cross-motions for summary judgment, the district court held that the State could not constitutionally require Quill to collect and remit use taxes. Relying principally upon *Bellas Hess*, the district court held that the State had failed to establish a sufficient nexus between Quill and the State, and that subsections (6) and (7) of Section 57-40.2-01 were therefore unconstitutional as applied to Quill. The court dismissed Quill's counterclaim seeking relief under 42 U.S.C. §§ 1983 and 1988.

Judgment was entered accordingly and the State appealed. Quill cross-appealed from that part of the judgment dismissing its counterclaim.

II

A

Quill concedes that its solicitation of sales in North Dakota meets the statutory and administrative guidelines for a "retailer maintaining a place of business in this state." Thus, the dispositive issue on appeal is whether the State may constitutionally require Quill to collect and remit the use tax.

Any discussion of imposition of the duty of collecting a use tax upon an out-of-state seller must begin with an analysis of *Bellas Hess*, *supra*. National Bellas Hess was incorporated in Delaware and had its principal place of business in Missouri. Illinois attempted to require National Bellas Hess to collect and remit use tax on mail order sales into that state. The United States Supreme Court summarized the constitutional background:

"National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. . . . As to the former, the Court has held that 'State taxation falling on interstate commerce * * * can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' . . . The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Bellas Hess*, *supra*, 386 U.S. at 756, 87 S.Ct. at 1391, 18 L.Ed.2d at 508-509 (citations omitted).

Characterizing National Bellas Hess as a mail order seller which did "no more than communicate with customers in the State by mail or common carrier," [*Bellas Hess*, *supra*, 386 U.S. at 758, 87 S.Ct. at 1392, 18 L.Ed.2d at 510], the Court, in a 6-3 decision, held that this connection with Illinois was insufficient to require National Bellas Hess to collect and remit the use tax. The Court drew a "bright line" distinction between mail order sellers whose only connection with its customers in the taxing state was by common carrier or the United States mail and those with more significant connections with the state.

The Court also stressed the substantial administrative burden upon National Bellas Hess if it were required to collect and remit use taxes to numerous jurisdictions. The Court noted that "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions." *Bellas Hess*, *supra*, 386 U.S. at 759-760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510 (footnotes omitted).

Justice Fortas, speaking for the dissenters in *Bellas Hess*, formulated a different approach for analyzing the contacts between a taxing state and an out-of-state seller necessary to satisfy Due Process and Commerce Clause requirements. Justice Fortas suggested a more case-specific approach which would take into consideration the nature and extent of the solicitation and exploitation of the state's consumer market:

"There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in 'exploitation of the consumer market' of Illinois . . . by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. Bellas Hess could not carry on its business in Illinois, and particularly its substantial credit business, without utilizing Illinois banking and credit facilities." *Bellas*

Hess, *supra*, 386 U.S. at 761-762, 87 S.Ct. at 1394, 18 L.Ed.2d at 511-512 (Fortas, J., dissenting) (citations omitted).

Justice Fortas forecast the rationale for the diminishment of the constitutional significance of "physical presence" in such cases:

> "Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein. Indeed, if it did either, the benefit that it received from the State of Illinois would be no more than it now has—the ability to make sales of its merchandise, to utilize credit facilities, and to realize a profit; and, at the same time, it would be required to pay additional taxes. Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users—and remit to the State—the use tax which is merely equal to the sales tax which resident merchants must collect and remit. To excuse Bellas Hess from this obligation is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers. In Illinois the rate is 3½%, and when it is realized that in some communities the sales tax requires, in effect, that as much as 5% be added to the amount that customers of local, tax-paying stores must pay, the importance of the competitive discrimination becomes apparent. While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis. In such cases, the difference between the nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance." *Bellas Hess*, *supra*, 386 U.S. at 762-763, 87 S.Ct. at 1394-1395, 18 L.Ed.2d at 512 (Fortas, J., dissenting).

The dissent also disputed the extent of the administrative burden which would be placed upon National Bellas Hess, noting that the majority's stated fear of entanglement of interstate commerce "vastly underestimates the skill of contemporary man and his machines." *Bellas Hess*, *supra*, 386 U.S. at 766, 87 S.Ct. at 1396, 18 L.Ed.2d at 514 (Fortas, J., dissenting). Justice Fortas therefore concluded that neither the Commerce Clause nor the Due Process Clause excused National Bellas Hess from complying with the Illinois use tax statutes.

B

The United States Supreme Court has not revisited this precise issue since 1967. While we necessarily begin our analysis in the context of the majority opinion in *Bellas Hess*, we are mindful that prior cases cannot be read in a vacuum, but must be considered in light of their relevant facts and historical context. See *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Scalia, J., concurring in part and dissenting in part). Similarly, appellate review in general is not to be conducted in a vacuum. *Cullen v. Williams County*, 446 N.W.2d 250 (N.D. 1989). Appellate judges bring to each case their common sense, ordinary experience, and observation of human affairs. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, ___ L.Ed.2d ___ (1991) (Rehnquist, C.J., dissenting); *State v. Olmstead*, 261 N.W.2d 880 (N.D.), *cert. denied*, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

Quill in effect asks us to accept the notion that the United States Supreme Court will abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent. We have in the past been chided by the United States Supreme Court for doing just that, and in failing to detect changes in legal course by that Court. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct 407, 38 L.Ed.2d 379 (1973), *reversing* 202 N.W.2d 140 (N.D. 1972). See also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, 219 N.W.2d 140 (N.D. 1974) (on remand).[3] We are guided by the maxim that "[w]hen the reason of a rule ceases so should the rule itself." Section 31-11-05(1), N.D.C.C. We have little doubt that maxim has wider application than our state boundaries. As noted by Justice Cardozo, "[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, The Nature of the Judicial Process 151 (1921) [*quoted in Kitto v. Minot Park District*, 224 N.W.2d 795, 803 (N.D. 1974)].

[3] The United States Supreme Court stated that its opinion in an earlier case, upon which we had relied in holding unconstitutional a state statute, was "a derelict in the stream of the law." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, *supra*, 414 U.S. at 167, 94 S.Ct. at 414, 38 L.Ed.2d. at 387. Significantly, in overruling its prior case, the Court quoted with approval the dissent in the earlier case. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, *supra*; see also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, *supra*, 219 N.W.2d at 146.

C

The economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. In the quarter-century which has passed in the interim, "mail order" has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as "direct marketing." The burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967.[4]

Rather than a few full-line mail order retailers essentially offering a "department store by mail," mail order

[4] Anyone with a telephone, television, or mailbox can attest to these modern marketing miracles. When you turn on your television set to one of the myriad of available cable channels, you are likely to see numerous commercials for products, "not available in any store," which must be ordered "before midnight tonight" by dialing the toll-free "800" number on the screen. If the commercials are not enough, you may find yourself watching a thirty-minute "infomercial" hawking items as diverse as cosmetics, car wax, weight loss plans, or cooking utensils. If you are a truly modern consumer, you may turn to one of the 24-hour home shopping channels, available on most cable systems, for a continuous opportunity to buy in the comfort of your living room.

The salesperson who calls on the telephone is likely to be armed with significant background information, including your age, occupation, ages of your children, and your hobbies and buying habits, so that sales calls can be specifically targeted to those customers statistically inclined to purchase certain products. Or, if you prefer, through the wonders of technology you can browse through a computer "catalog," check availability and price of the item you want, and place your order directly through the seller's computer across the country.

The revolution in direct marketing techniques and technology is recounted in Stone, *Direct Marketing: Then and Now, Direct Marketing*, May 1988, p. 38.

is today marked by literally thousands of specialized catalogs targeted at specific groups of consumers. Technology has triggered this transformation, with computerized database marketing allowing mailings directed to specific demographical groups. In fact, the sale and rental of lists of names of prior or potential mail order purchasers has itself become a three-billion-dollar business.[5] Technology has also changed the method of receiving orders, with the increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering replacing the less-immediate "mail" order, and advances in the parcel delivery industry allow a wide variety of options, including overnight delivery.

Perhaps the greatest change in mail order since 1967 has been in terms of sheer volume. Gone are the days of the Spring and Fall Sears catalog being the definition of mail order. It is estimated that in 1990 13.6 *billion* catalogs were mailed to consumers in the United States, an increase of 7.8 billion in ten years. Over 54 percent of Americans—98 million—made a mail order purchase, an increase of 40 million since 1983.[6] Mail order sales, in the neighborhood of $2.4 billion in 1967 [*see Bellas Hess, supra*, (Fortas, J., dissenting)], reached the staggering figure of $183.3 billion in 1989.[7] By the mid-1980's, mail order accounted for more than 15 percent of total sales nationally. See, e.g., 43 Cong. Q. 2571 (Dec. 7, 1985); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand.L.Rev. 993 (1986).

[5] *Time*, November 26, 1990, at p. 66.

[6] These figures are from the Direct Marketing Association, as reported in their special advertising section in the March 14, 1991, edition of USA Today, at pp. 10A-11A.

[7] See *Time*, November 26, 1990, at P. 63; *Direct Marketing*, July 1990, at p. 30.

While in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer. Clearly the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's.

D

Just as the changes in marketing techniques have affected the economic and commercial landscape since *Bellas Hess*, so too has the legal landscape been altered in that quarter-century.[8] The Supreme Court's expansion of state authority to tax interstate commerce, as well as its broadening of other areas of Due Process and Commerce Clause analysis, leads us to conclude that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude.

Perhaps the most striking shift in the Court's position on taxation of interstate commerce occurred in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), in which the Court overruled years

[8] As the Supreme Court noted in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510, 524 (1980), "[t]he effect of the Commerce Clause on state taxation of interstate commerce . . . appears to be undergoing a revival of sorts" and "this Court has addressed the issue and has attempted to clarify the apparently conflicting precedents it has spawned."

of precedent and developed a four-prong test to assess Commerce Clause challenges to state taxation of interstate commerce. Prior to that time, Commerce Clause analysis was controlled by the free trade view, as enunciated in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), that direct taxation of interstate commerce was *per se* unconstitutional. See P. Hartman, Federal Limitations on State and Local Taxation §§ 2:16, 2:17 (1981) [hereafter "Hartman, Federal Limitations"]; Recent Developments, *D.H. Holmes Co. v. McNamara: Use Tax on Catalogs Does Not Violate Commerce Clause*, 63 Tul. L. Rev. 407 (1988). Thus, at the time of *Bellas Hess*, Commerce Clause analysis often focused upon whether the challenged tax was levied upon the privilege of doing interstate business or upon some other less-direct incidence of interstate commerce.

The *Spector* doctrine was widely criticized as dependent upon illusory distinctions, legislative labelling, and insubstantial and pointless formalism. Hartman, Federal Limitations, *supra*, at §§ 2:16-2:17; see also, *Complete Auto*, *supra*; McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529 (1985); Recent Developments, 63 Tul. L. Rev. 407, *supra*. The Court, noting that the *Spector* rule "has no relationship to economic realities" and "stands only as a trap for the unwary draftsman," *Complete Auto*, *supra*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331, specifically overruled *Spector* and announced a four-prong test for evaluating Commerce Clause challenges to state taxation. Under the *Complete Auto* formulation, a tax does not violate the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto*, *supra*; see also, *Trinova Corp. v. Michigan Department of Treasury*, ___ U.S. ___, 111 S.Ct. 818, 112 L.Ed.2d 884 (1991); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

One month after deciding *Complete Auto*, the Court expanded the authority of the states to require out-of-state sellers to collect and remit a use tax in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). National Geographic sold maps, atlases, globes, and books by mail order to California residents. National Geographic had two offices in California which solicited advertising for its magazine, but which performed no activities related to the mail order sales. National Geographic challenged California's authority to require collection of use tax on its mail order sales, alleging that there was insufficient nexus between its mail order sales and California.

In prior cases, including *Complete Auto*, the Court had phrased the nexus requirement in terms of the relationship between the taxing state and the *activity* to be taxed. In *National Geographic*, however, the Court expanded the concept of nexus in use tax cases to situations where the out-of-state *seller* has the requisite nexus with the taxing state. Thus, the Court focused upon the benefits and services provided by the state to National Geographic's two advertising offices to support collection of use tax upon its unrelated mail order sales into the state.

In so holding, the Court stressed the distinction between the lesser burdens placed upon the seller by a use tax, which is ultimately borne by the in-state purchaser, and a more direct tax upon the seller:

> "Other fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State. . . .

> "The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. . . . The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing state is self-evident. . . . The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it." *National Geographic, supra*, 430 U.S. at 558, 97 S.Ct. at 1391, 51 L.Ed.2d at 638 (citations omitted).

Thus, the Court not only expanded the concept of nexus, but it also recognized the purely administrative nature of the collection duty in use tax cases and indicated that a lesser showing of nexus may suffice in such cases.

More recently, in a case presenting an interesting twist to the usual use tax situation, the Court upheld imposition of use taxes upon catalogs themselves in *D.H. Holmes Co. v. McNamara, supra*. Holmes, which had thirteen stores in Louisiana, had its catalogs printed out-of-state and mailed from those locations directly to Louisiana customers. The catalogs promoted items available for sale in the local stores, and also could be used to order items by mail. Louisiana sought to collect from Holmes use taxes based upon the value of the catalogs, asserting that they were "used" by Holmes within the state.

The Court applied the *Complete Auto* test and upheld imposition of the tax. Most importantly for our purposes, the Court distinguished *Bellas Hess* in holding that Holmes had sufficient nexus with Louisiana. Although, as the Court noted, there was " 'nexus' aplenty" present, *Holmes, supra*, 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29, what is particularly noteworthy is the language employed by

the Court to distinguish *Bellas Hess*. Notwithstanding that Holmes was incorporated in Louisiana, had its registered office there, and had thirteen stores with 5,000 employees in the state, the first factor noted by the Court in distinguishing *Bellas Hess* was "Holmes' significant *economic* presence in Louisiana." *Holmes, supra*, 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29 (emphasis added). In a case involving obvious physical presence, we find it significant that the Court chose to stress economic presence, the phraseology of the *Bellas Hess* dissent.

The Court has also discussed the broadening concept of nexus in cases involving constitutional challenges to other taxes upon interstate commerce. For example, in *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), a manufacturer of industrial and aerospace fasteners challenged imposition of Washington's business and occupation tax levied upon its unapportioned gross receipts from sales in the state. Standard Pressed Steel's sole connection with the state, other than its interstate sales, was one employee, working from his home in the state, who serviced the company's one large account in the state, the Boeing Company. This employee was a consultant only; he did not take orders on behalf of Standard.

Rather than focusing upon Standard's minimal physical contact with the state through a single employee, and the concomitant minimal benefits and services provided to the company, the Court instead emphasized the connection between the employee's activities and the establishment and continuance of sales to Boeing. In other words, instead of relying upon a bright-line demarcation based upon Standard's physical presence in the taxing state and the receipt of benefits and services, the Court in finding nexus stressed that the employee "made possible the realization

and continuance of valuable contractual relations between [Standard] and Boeing" [*Standard Pressed Steel*, *supra*, 419 U.S. at 562, 95 S.Ct. 708, 42 L.Ed.2d at 722], and that the employee's "services were substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured.' " *Standard Pressed Steel*, *supra*, 419 U.S. at 563, 95 S.Ct. at 709, 42 L.Ed.2d at 723 (*quoting General Motors Corp. v. Washington*, 377 U.S. 436, 447, 84 S.Ct. 1564, 1571, 12 L.Ed.2d 430, 439 (1964), *overruled on other grounds*, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed. 2d 199 (1987)). In so holding, the Court stated that Standard's asserted lack of nexus "verges on the frivolous." *Standard Pressed Steel*, *supra*, 419 U.S. at 562, 95 S.Ct. at 708, 42 L.Ed.2d at 722.

In *Tyler Pipe*, *supra*, the Court was again presented with a nexus challenge to the Washington business and occupation tax. Tyler Pipe had one representative soliciting business in state, but, in contrast to *Standard Pressed Steel*, *supra*, Tyler Pipe's salesman was an independent contractor, not an employee. The Court, relying upon *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), held that the salesman's status as an independent contractor was without constitutional significance. Concluding that the activities of the independent contractor within the state created a sufficient nexus to support imposition of the tax, the Court agreed with the Washington Supreme Court that " 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Tyler Pipe*, *supra*, 483 U.S. at 250, 107 S.Ct. at 2821, 97 L.Ed.2d at 215-216 (*quoting Tyler Pipe Industries, Inc. v. State*, 105 Wash.2d

318, 323, 715 P.2d 123, 126 (1986)). Thus, in both *Standard Pressed Steel* and *Tyler Pipe*, the Court did not employ a bright-line physical presence test, but instead focused upon the relationship between the out-of-state seller's contacts with the state and its establishment and maintenance of sales within the state.

While the Court has been expanding states' authority to tax interstate commerce, it has also significantly broadened the closely related Due Process analysis in personal jurisdiction cases. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 540-541 (1985), the Court summarized some examples of conduct which will satisfy the minimum contacts requirement and justify assertion of personal jurisdiction over an out-of-state seller:

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum. . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities. . . . Thus '[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers. . . . Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. . . . And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities. . . ." (Citations omitted.)

It is clear that Quill has "purposefully directed" its activities at North Dakota residents, has "reach[ed] out . . . and create[d] continuing relationships and obligations with citizens" of this State, and has gone beyond placing its products into a general stream of commerce—it has sold and delivered its products directly to North Dakota consumers. It is therefore clear that Quill could, consistent with Due Process, be brought into a North Dakota court to litigate claims arising from those activities.

More significant, however, is the Court's clear recognition that technological advances have made physical presence within the jurisdiction meaningless in modern commerce:

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King, supra*, 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543.

The Court also recognized the unfairness which would result if out-of-state sellers were allowed to wholly escape responsibility for the consequences of their actions in other states:

> "Moreover, where individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise

> proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. . . ." *Burger King, supra*, 471 U.S. at 473-474, 105 S.Ct. at 2183, 85 L.Ed.2d at 541 (citations omitted).

E

In light of these wholesale changes in the social, economic, commercial, and legal arenas, we are required to apply *Bellas Hess* in a contemporary context as we believe the Supreme Court would apply that decision.

The Supreme Court has recently recognized that sweeping technological changes may require corresponding changes in legal doctrine. In *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), Illinois' telecommunications excise tax was challenged on Commerce Clause grounds. After a lengthy discussion of the "explosion in new telecommunications technologies" [*Goldberg, supra*, 488 U.S. at 255, 109 S.Ct. at 585, 102 L.Ed.2d at 613], the Court concluded that "Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry." *Goldberg, supra*, 488 U.S. at 265, 109 S.Ct. at 591, 102 L.Ed.2d at 619. Commenting on prior cases striking down similar state taxes on interstate telecommunications, the Court simply noted that "[t]hese cases considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete*

Auto era when this Court held the view that interstate commerce itself could not be taxed." *Goldberg, supra*, 488 U.S. at 265 n.16, 109 S.Ct. at 591 n.16, 102 L.Ed.2d at 619 n.16.

Similarly, the Court in *Burger King, supra*, 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543, noted the technological changes which have affected modern commerce: "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." In *Goldberg* and *Burger King* the Court has recognized that legal theory must be flexible to account for societal changes, and that the vast technological explosion of recent years often requires rethinking of previous doctrine. We therefore are instructed to be cognizant of the vast differences between the mail order of the 1960's and the direct marketing of the 1990's when applying *Bellas Hess* in this case. In addition, the *Bellas Hess* majority specifically characterized the transactions there as being carried out only by mail or common carrier. Very little of the direct marketing of today is limited to mail or common carrier, and the facts of this case clearly demonstrate that Quill's business extended far beyond those limited circumstances.

We also recognize the Court's extensive shift in focus in interstate commerce tax cases. The Court has wholly rewritten the underlying theory in such cases and formulated a new test to measure Commerce Clause challenges. See *Complete Auto, supra*. In *National Geographic, supra*, the Court stressed the administrative nature of the use tax collection requirement and held that a lower threshold of nexus may suffice in use tax cases than in attempts to collect a tax directly from the out-of-state

seller. In *Holmes, supra*, the Court applied the *Complete Auto* test to judge a use tax and noted the seller's significant economic presence within the taxing state to find sufficient nexus and distinguish *Bellas Hess*.

Complete Auto and subsequent interstate commerce tax cases have been viewed as an abandonment of the Court's previous formalistic approach in favor of a "more realistic functional calculus" [L. Tribe, American Constitutional Law § 6-15, at 441 (2d ed. 1988)], "grounded in practicality and economic reality" [Recent Developments, 63 Tul. L. Rev. 407, *supra*]. See also, *Trinova Corp. v. Michigan Department of Treasury, supra*; *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980). The Court's opinions in *Standard Pressed Steel* and *Tyler Pipe* also demonstrate a greater emphasis upon the economic consequences and realities of the transactions at issue rather than a bright-line physical presence test. Although in each of these cases there was some degree of physical presence within the taxing state, the Court's analysis evinces a retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach. Accordingly, we believe that a contemporary view of nexus is not dependent upon rigid benchmarks to be applied across the board, but requires a review of the totality of the circumstances, on a case-by-case basis, with special emphasis upon the economic realities presented. See Hartman, *Collection of the Use Tax, supra*. This approach best comports with the Court's current Due Process and Commerce Clause analysis.

We are particularly mindful of the illogical results which can flow from a strict requirement of physical presence within the taxing state in light of the contemporary legal and commercial landscape. For example, a small out-of-state seller with minimal sales in the taxing state solicited

through an independent-contractor traveling salesperson would have sufficient nexus to support a duty to collect and remit the use tax [see *Tyler Pipe*, *supra*, and *Scripto*, *supra*], yet a mail order leviathan with millions of dollars of annual sales solicited by innumerable catalogs and flyers, and consummated by telephone, fax, telex, or direct computer contact, would be deemed unreachable because it has insufficient nexus with the state. Such a result merely propounds the legal fiction that the fire and police protection provided to one salesperson hawking wares in the state provides a more significant "benefit" than does creating and maintaining a social and commercial climate that enables the out-of-state seller to exploit the state's consumer market to the tune of millions of dollars. See, e.g., Hartman, *Collection of the Use Tax*, *supra*; Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw.U.L.Rev. 112 (1978).

The Court's current personal jurisdiction analysis also strongly suggests a retrenchment from physical presence as a benchmark in Due Process analysis. A corporation that merely delivers its product into the stream of commerce with the expectation that it will be purchased by a consumer in another state may be subjected to litigation there [*Burger King*, *supra*], yet Quill asserts that subjecting it to collection of the use tax, in spite of its continuous, intentional, and massive exploitation of this State's consumer market, would be violative of Due Process. It would be illogical indeed to hold that Quill, which could clearly be haled into a North Dakota court if one of its products injured a North Dakota consumer, could not be saddled with the purely *administrative* burden of collecting a use tax. See *National Geographic*, *supra*.

Finally, we note the irony in Quill's reliance upon the Due Process Clause and the Commerce Clause in seeking

to maintain a tax-free mail order haven and thereby retain an economic advantage over its local competitors.[9] The touchstone of Due Process is fundamental fairness. *Burger King*, *supra*; *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The "very object" of the Commerce Clause is protection of interstate commerce from discriminatory local practices. *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347, 349 (1875); see also, L. Tribe, American Constitutional Law, *supra*, at § 6-17. However, rather than employing the Commerce Clause as a shield against unfair, discriminatory practices favoring local merchants, Quill now raises the Commerce Clause as a sword to carve out a tax-free mail order niche and gain an unfair competitive advantage over local retailers. It would be odd indeed if we were to hold that out-of-state sellers may invoke the Due Process Clause to promote a fundamentally unfair economic advantage over local sellers.

We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota. Applying *Bellas Hess* in light of subsequent case law, and within the context of contemporary society and commercial practice, we conclude that the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities pro-

[9] Empirical studies have demonstrated the effect of the presence or absence of sales or use taxes upon consumer purchasing behavior. See, e.g., Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 Journal of Retailing 222 (1990).

vided by the state, and should stress economic realities rather than artificial benchmarks.

F

The Court in *Bellas Hess* also focused upon the "virtual welter of complicated obligations" which would be imposed upon mail order sellers if they were required to collect and remit use taxes in every state. *Bellas Hess*, *supra*, 386 U.S. at 760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510. This basis for the Court's holding has also been seriously eroded by the technological advances of the past quarter-century. The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty. See, e.g., Hartman, Federal Limitations, *supra*, at § 10:8; Hartman, *Collection of the Use Tax*, *supra*; McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U.L. Rev. 265 (1985).

In addition, in subsequent use tax cases the Supreme Court has all but ignored the burdensome nature of imposition of the collection duty. Furthermore, the Supreme Court has never struck down a use tax solely because of the administrative burdens placed upon the out-of-state seller if sufficient nexus has first been found.

Finally, we note that the seller is allowed to retain a percentage of the use taxes collected as reimbursement for expenses incurred in collecting and remitting the tax. Section 57-40.2-07.1, N.D.C.C. This further alleviates any burdens created by requiring Quill to collect and remit the tax.

We conclude that the burdensome nature of the use tax collection duty does not prohibit imposition of this duty upon Quill in this case.[10]

III

We now turn to the specifics of Quill's constitutional challenge in this case.

All legislative enactments are imbued with a strong presumption of constitutionality, and this presumption is conclusive unless it is clearly shown that the statute contravenes the state or federal constitution. *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280 (N.D. 1990). The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity. *Best Products Co., Inc. v. Spaeth*, 461 N.W.2d 91 (N.D. 1990); *Neuman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979). Any doubt must be resolved in favor of the constitutionality of the statute. *North Dakota Council of School Administrators*, *supra*.

Commerce Clause challenges to use taxes are reviewed under the *Complete Auto* test. See Holmes, *supra*. The only prong of the *Complete Auto* test raised by Quill is the nexus requirement.[11] This first prong is closely related

[10] This argument is also undermined in this case by Quill's extensive computer expertise. Quill sells computers and related hardware, and has developed its own computer software to allow customers to contact Quill directly on their own computers to place orders, check price and availability, and communicate via an electronic bulletin board.

[11] Quill did not, in fact, place its arguments within the context of the *Complete Auto* test, which clearly governs review of a Commerce Clause challenge to a use tax. See *Holmes*, *supra*.

to the fourth prong of *Complete Auto*, which requires that the tax be fairly related to the benefits, opportunities, or services provided by the taxing state. Nexus has historically been analyzed as whether the state has provided some protection, opportunity, or benefit for which it can expect a return. See, e.g., *Bellas Hess*, *supra*; *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940). Thus, we necessarily consider these two related prongs in determining the constitutionality of the use tax as applied to Quill.[12]

The Supreme Court has clarified that the Due Process requirement of a "minimal connection" to establish nexus is encompassed within the *Complete Auto* test. *Trinova Corp. v. Michigan Department of Treasury*, *supra*; *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). Thus, if the tax satisfies the nexus requirement of the *Complete Auto* test, it a fortiori satisfies the Due Process nexus requirement. *Amerada Hess*, *supra*.

As discussed in previous sections of this opinion, current Due Process and Commerce Clause analyses indicate that lack of physical presence within the taxing state is not the sole determinative factor in analyzing nexus questions. Rather, we must review all of Quill's contacts with the State to determine whether Quill has a sufficient nexus to satisfy constitutional standards.

Quill's activities directed toward North Dakota consumers clearly establish a substantial "presence" within the

[12] No assertion has been made that the use tax is not fairly apportioned or that it discriminates against interstate commerce. Thus, the second and third prongs of the *Complete Auto* test need not be addressed.

State. To iterate Quill's activities, it has 3,500 active customers in North Dakota, and its annual sales of nearly $1,000,000 make it the sixth largest seller of office supplies in the State. It annually mails over 60 different catalogs and flyers to its North Dakota customers, accounting for 230,000 separate pieces of mail. Quill also has a "help line" for consumers to call if they have questions or problems with merchandise ordered from Quill, and specialized service representatives are available to assist with custom printing orders or to answer questions about computers available from Quill. Quill has availed itself of modern technology to engage in an extensive, continuous, and intentional solicitation and exploitation of the State's consumer market and has thereby established an ubiquitous presence in the State.

Quill has a further connection with North Dakota which supports a finding of nexus. Quill licenses to some of its North Dakota customers a computer software program, Quill Service Link ["QSL"], which permits customers direct computer access to Quill's computer. This allows customers to check Quill's available inventory, confirm current price, and order merchandise directly by computer. Customers with QSL can also communicate with Quill and other customers through an electronic "bulletin board."

Quill retains all rights in QSL through the license agreement. Quill also retains the right to terminate the license "forthwith without prior notice and without cause," and upon termination the customer must "immediately return Software, and copies thereof and the user documentation to Quill." The explicit terms of the licensing agreement belie Quill's assertion that it merely sells the software—lock, stock, and barrel—to the customer. Through its licensing agreement, Quill clearly retains rights to property

situated in North Dakota,[13] providing further nexus with the State. See *Matter of Heftel Broadcasting Honolulu,*

[13] The State argues that Quill owns other property in North Dakota, providing a further showing of nexus and benefits. The State asserts that Quill makes sales on approval in North Dakota and retains title to the goods until the merchandise is accepted or rejected by the buyer. Thus, the State argues, Quill owns property within the State which receives fire and police protection, as well as other benefits.

Quill's catalog makes the following offer to customers:

> "Use any product from Quill in your office FREE for 30 days. During that time, try it, inspect it, use it . . . just to be sure you're satisfied with the product. You have no reason to pay us and can return it during that period for any reason . . . no questions asked . . . and we'll give you a full credit against your invoice."

In addition, customers may, at any time within 90 days of purchase, return any item for a full refund if not completely satisfied.

Section 41-02-43(1), N.D.C.C, [U.C.C. §2-326] provides:

> "*Sale on approval and sale or return—Consignment sales and right of creditors.*
>
> "1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> "a. A 'sale on approval' if the goods are delivered primarily for use.
>
> "b. A 'sale or return' if the goods are delivered primarily for resale."

If a transaction constitutes a sale on approval under Section 41-02-43(1), title to the goods does not pass until the buyer accepts them. Section 41-02-44(1)(a), N.D.C.C.

Quill asserts, however, that its sales are not "sales on approval" because it does not offer an "unconditional guarantee of refund" and because in some cases the buyer must pay the return shipping costs.

The district court summarily rejected the State's argument and ruled that, as a matter of law, title to the merchandise passed to the purchaser immediately at the time of shipping. Although the court's ruling was wholly conclusory and failed to fully take

(Footnote continued on following page)

Inc., 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977).

Quill asserts, however, that the State has provided no protections, benefits, or opportunities which justify imposition of the duty to collect and remit the use tax. Quill would have us limit our consideration to solely property-protection functions of the State, such as fire and police protection, in determining whether the State has given something for which it may ask a return. However, just as the Court's cases of the past 25 years have broadened the concept of nexus, so too have recent cases suggested an expanding view of the benefits which may support State taxation. See, e.g., *Goldberg*, *supra*; *Holmes*, *supra*. Such intangible factors as the benefit of a trained work force and the "other advantages" of a civilized society have been cited by the Court to support imposition of taxes. See, e.g., *Amerada Hess*, *supra*; *Goldberg*, *supra*; *Holmes*, *supra*. The court, in upholding a tax on an out-of-state seller, has also noted Justice Holmes' declaration that "government is the prerequisite for the fruits of civilization for which. . . . we pay taxes," and that, accordingly, it was the state that had made the seller's earnings possible. *Wisconsin v. J.C. Penney Co.*, *supra*, 311 U.S. at 446, 61 S.Ct. at 250, 85 L.Ed. at 271.

Various commentators have noted that the benefits and opportunities considered in determining nexus should include economic benefits and opportunities conferred by the

[13] *continued*

into account the underlying factual issues necessary to a determination of the legal issues, we find it unnecessary to resolve this issue at this time. Because we have held that sufficient nexus exists to support imposition of the duty to collect and remit the use tax, we need not determine if Quill has additional nexus with the State through retention of title to goods sold on approval.

State. See, e.g., Hartman, Federal Limitations, *supra*, at §§ 2:7 and 10:8; Hartman, *Collection of the Use Tax*, *supra*; McCray, *Overturning Bellas Hess*, *supra*; Simet, *The Concept of "Nexus,"*, *supra*; Note, *Imposition of the Duty to Collect State Use Taxes: Constitutional Prohibitions Are No Longer Valid in Mail Order Sales*, 32 S.D.L.Rev. 93 (1986). The underlying rationale is that these benefits and opportunities bear a more direct relationship to the generation of sales for the mail order seller than the comparatively inconsequential benefits and protections provided for a seller's property or personnei within the State. Whether or not an out-of-state seller has a physical presence within the State, it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services.

The theory has been summarized by Professor Emeritus Hartman:

> "An unrealistic facet of the *Bellas Hess* doctrine is that the Court presumably thought that a few 'warm bodies' in the taxing state—either operating from an office, or traipsing around hawking their wares without any in-state office—constitute a more satisfactory nexus with a state, for constitutional purposes, than other more substantial and meaningful connections. Benefits from the taxing state that are unrelated to physical contact with the state may be of vastly greater significance than those derived from the presence of a whole swarm of the out-of-state seller's agents soliciting business. Practically speaking, some form of physical presence within the state in furtherance of a business purpose is not essential to the existence of a meaningful nexus with the state.
> . . .
>
> "For use tax collection purposes, the connection or nexus between the taxing state and out-of-state mail-order sellers should be an economic, rather than physical, relationship. When an out-of-state mail-order seller, for the purpose of realizing a profit, takes advantage of the taxing state's economic climate and milieu through systematic, continuous, and large-scale solicitation of that state's consumer market, that activity should constitute a connection or nexus sufficient to require the out-of-state seller to collect the use tax. When the state provides a substantial economic benefit to the production of income for the out-of-state seller, the taxing state should be able to demand a tithe from the seller." Hartman, *Collection of the Use Tax*, *supra*, 39 Vand.L.Rev. at 1013-1014.

Other benefits provided by the state to the mail order seller have also been noted:

> "[I]f the buyer is a typical mail order consumer who remains passive in a transaction and does not enter the seller's state, actively initiate contact, negotiate substantial terms of a transaction, or undertake ongoing business relationships with the seller, he is not deemed subject to the jurisdiction of the seller's state in a breach of contract action. Sellers are also prohibited from bringing suits in their own states against out-of-state buyers because of a Federal Trade Commission order enjoining such suits as unfair trade practices. A mail order seller may thus enforce his legal rights against a delinquent or fraudulent buyer *only* in the courts of the buyer's state. Thus it is the buyer's state that protects the revenues of the out-of-state seller.
>
> "The buyer's state also benefits the seller by assuring him an orderly market through consumer protection and usury laws on mail order transactions. Such laws create consumer confidence and eliminate unscrupulous sellers from the market. Consumer confidence is critically important to sales which cross state lines. In mail order transactions, consumers must rely heavily on state enforcement mechanisms to rectify

wrongs and enforce rights." McCray, *Overturning Bellas Hess*, *supra*, 1985 B.Y.U.L.Rev. at 285.

An additional indispensable service is provided by the State: it disposes of the 24 tons of solid waste contributed annually to North Dakota landfills by Quill's catalogs and flyers. Although a similar argument was recently rejected in *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666 (1991), we do not find the reasoning of that case persuasive. The court's discussion of the issue, in total, states:

> "The commissioner's argument, that Folio derives benefit from Connecticut by virtue of the state disposing of the catalogs as paper trash is likewise without merit. Because the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal." *SFA Folio Collections, Inc.*, *supra*. 585 A.2d at 671 n.6.

The court's rationale is far too simplistic. To suggest that the seller derives no benefit from the State's waste-collection efforts because theoretically the catalogs become the consumer's "property" when they reach the mailbox ignores the realities of the situation, and fails to take into account that most mail order solicitations have not been requested, and may in fact be unwanted, by the consumer.[14] It is the mail order seller who derives the most direct benefit from its own mailings, and it therefore is not unreasonable to assume that the seller derives some measure of benefit from the entity that is ultimately responsible for disposing of the veritable mountain of trash created thereby.[15] Certainly the benefit is as direct and consequential as the benefits provided by fire and police protection afforded to an independent contractor solicitor within the state, which have been found sufficient to uphold taxation. See *Tyler Pipe*, *supra*.

[14] It is estimated that 44% of all such direct mail solicitations are disposed of unopened and unread. *Time*, November 26, 1990, at p. 64.

In response to the Connecticut court's rationale it might also be pointed out that, even if we accept the argument that catalogs and flyers become the consumer's property when they are received and that the consumer must therefore contribute to the cost of their disposal, it is the consumer, not the out-of-state seller, who bears the ultimate burden of the use tax. The benefit that the mail order seller receives through the waste collection and disposal services of the state are certainly direct enough to support imposition of the purely administrative burden of collecting and remitting the use tax. See *National Geographic*, *supra*.

Quill also derived other benefits from the State. Because Quill retained ownership rights in its QSL software and accompanying user documentation, Quill received fire and police protection for its property within the State. The record also demonstrates that Quill contacted North Dakota financial institutions to check credit information on customers, an activity furthered by State regulation of the banking industry.

We conclude that Quill's significant economic presence within the State and its retained ownership of property

[15] Recent estimates indicate that such "junk" mail "is now a nearly 4 million-ton colossus that accounts for 39% of all U.S. postal volume. This year about 41 lbs. of junk mail have been generated for each adult American." *Time*, November 26, 1990, at pp. 63-64.

within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax. We also conclude that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax. Accordingly, the use tax as applied to Quill satisfies the four-prong test of *Complete Auto* and does not violate the Due Process Clause or the Commerce Clause.

Because we hold that the State may constitutionally require Quill to collect and remit use tax on its North Dakota sales, the State's conduct provides no basis for relief under 42 U.S.C. §§ 1983 and 1988. It is therefore unnecessary to address Quill's cross-appeal.

The judgment of the district court is reversed and we remand for entry of a judgment declaring that Quill is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with Chapter 57-40.2, N.D.C.C.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota by and through its Tax Commissioner, Heidi Heitkamp,
Plaintiff,

vs.

Quill Corporation,
Defendant.

JUDGMENT ON REMAND

Pursuant to the Judgment entered in this case on appeal to the Supreme Court, State of North Dakota, Supreme Court File No. 900257, dated May 7, 1991, and certified to this court on May 31, 1991, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with North Dakota Century Code ch. 57-40.2.

WITNESSETH, my hand and the seal of this Court, this 5th day of June, 1991.

[Signed]
Debra Huntley
Clerk of the District Court

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP, Plaintiff,	)	CIVIL NO. 41677
-v-	)	
QUILL CORPORATION, Defendant.	)	MEMORANDUM OPINION

This action brought by the State of North Dakota seeks to have the Quill Corporation declared a "retailer" for purposes of applying the North Dakota Sales and Use Tax on the distribution of Quill's products in our state. The Answer of Quill admits most of the facts alleged by the State, but specifically denies they are required to obtain a certificate of authority to do business in our state or that they are liable to remit a use tax on the products sold here. They specifically claim that the Tax Commissioner is acting in violation of the commerce clause of the United States Constitution.

The basis for taxation of products in North Dakota is Section 57-40.2-01(6) which amended the definition of "retailer" in 1987 to read as follows:

> "A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers or other advertising, or by means of print, radio or television media, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."

The facts of this matter show that Quill is a Delaware Corporation with its principal place of business in Illinois, with additional offices and warehouses in California. Quill solicits sales of merchandise through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota. Quill does not maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does not have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does not have any telephone listing or toll free telephone line, and does not advertise by any radio or television media in North Dakota; it does not advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. All of the business conducted in North Dakota is done by United States mail, telephone or common carrier.

The point at which the parties depart in their interpretation of the facts is whether Quill has any real or personal tangible property in the State of North Dakota. The argument advanced by the state is that since Quill sells all of its items with an unequivocal ninety day guarantee, Quill remains the owner of such property until this approval period expires. Quill, on the other hand, claims that title passes at the time the property is shipped from their outlets in Illinois or California.

It seems clear to the Court that the case of *Hess v. Illinois*, 386 US 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial. Hess's manner of doing business in Illinois was similar to that of Quill in this case. The Supreme Court of the United States ultimately stated that there was insufficient nexus with the Hess Corporation to tax the sales that were taking place through the use of the mails.

In attempting to differentiate itself from that decision, the State, in this case, has chosen to identify the ninety-day guarantee as a "sale on approval". This argument has been advanced in numerous other states without success, and the Court finds no reason to adopt that theory here. I am satisfied that title changes hands at the time of the mailing, and that the risk on the items sold in this manner fall upon the purchaser in North Dakota at the time they receive the property, and not ninety days later as the state suggests.

Many of the arguments made by the State in this case are merely restatements of the remarks made by Mr. Justice Fortas in the *Hess* case. His dissent very logically sets forth reasons why *Hess* should have been taxed in Illinois, but the Supreme Court in that case failed to adopt his arguments. Although I find the arguments quite persuasive, this is not the law of the United State nor of the State of North Dakota.

Hess does, however, set forth the rationale for state taxation on interstate commerce. These concepts are set forth in the decision and read as follows:

> "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of a local government whose protection it enjoys. . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the simple but controlling question is whether the state has given anything for which it can ask return." See *Hess* at page 756.

Rather than dwell on the intricacies of title passing as the State has done in this case, they should have been presenting facts to the Court showing that the State of North Dakota spends funds for the protection and benefit of the mail order business. By doing so, they could show that taxation was not only for the benefit of local residents, but for the benefit of the mail order houses. Until these facts can be obtained, there is no nexus to allow the state to define retailer in the manner it chose. The mere fact that this appears to be unfair to the local retrailers [sic] cannot be a determining factor in this case. The focus must be on the beneficiary of the taxes as opposed to the consequences. Until this can be established, it would appear that the tax dollars spent protects the local resident and does not benefit the out of state mail order business in any significant manner.

The State, during argument, urged that the reasoning of *Goldberg v. Sweet*, 488 US ____ 102 LEd 2d 607, 109 S Ct 582 (1989), extends the taxing arm of the State to Quill. However, the primary difference in that case is that the parties stipulated Illinois had a substantial nexus with the interstate telecommunications reached by the Tax Act. That is precisely the issue in controversy in this case, and on which I fail to find any presence (nexus) of Quill in North Dakota.

Based on the foregoing, the language heretofore quoted in Section 57-40.2-01(6) and that found in subsection 7 is declared to be in violation of the United States Constitution and accordingly declared invalid as applied to Quill.

Counsel for the defendant may prepare the appropriate Order for Summary Judgment granting relief to them. The Court does not grant attorney's fees to the defendant, but only costs.

Dated: May 15, 1990
At Bismarck, North Dakota

BY THE COURT:

[Signed]

Benny A. Graff, District Judge

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP,	)	
Plaintiff,	)	ORDER FOR JUDGMENT
vs.	)	
QUILL CORPORATION,	)	
Defendant.	)	

The above entitled matter having come before the Court on a motion for partial summary judgment by the Defendant, and a cross-motion for summary judgment by the Plaintiff, the parties having appeared through counsel of record and having filed briefs in support of and in opposition to the respective motions and having presented oral arguments to the Court, the Court being fully advised in the premises herein and having issued its Memorandum Opinion herein on May 15, 1990, wherein the Court held that application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Defendant Quill Corporation was in violation of the United States Constitution and accordingly said statutes were declared invalid as applied to Quill Corporation; the Court now makes the following ORDER:

1. The Defendant's motion for partial summary judgment is granted;

2. The Plaintiff's cross-motion for summary judgment is denied;

3. The Defendant shall recover its costs according to North Dakota law, but its counterclaim seeking attorneys' fees under 42 U.S.C. § 1988 is denied; and

4. The Clerk is directed to enter judgment in accordance with this Order.

Dated this 11th day of June, 1990.

BY THE COURT:

[Signed]
BENNY A. GRAFF
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP,	)	
Plaintiff,	)	JUDGMENT
vs.	)	
QUILL CORPORATION,	)	
Defendant.	)	

Pursuant to the Order for Judgment entered and filed herein, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use tax on its mail-order sales, as application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Quill Corporation is in violation of the United States Constitution and said statutes are invalid as applied to Quill Corporation; that the Defendant shall recover its costs according to North Dakota law; and that the Defendant's counterclaim is dismissed with prejudice.

WITNESS, The Honorable Benny A. Graff, District Judge, South Central Judicial District, Burleigh County, North Dakota, and my hand and the seal of said Court, this 11th day of June, 1990.

[Signed]
Marian Barbie
Clerk of the District Court

UNITED STATES
CONSTITUTIONAL PROVISIONS INVOLVED

art. I, section 8, cl. 3. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

art. VI. . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

amend. XIV. section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

NORTH DAKOTA
CHAPTER 57-40.2
USE TAX ACT

Sec. 57-40.2-01. Definitions. In this chapter, unless the context and subject matter otherwise require:

1. "Business", . . . "gross receipts", . . . "retail sale", "sale", each shall have the meaning given to it in section 57-39.2-01.

* * *

3. "Purchase" means any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration. "Purchase" shall also mean the severing of sand or gravel from the soil of this state.

* * *

6. "Retailer" includes every person engaged in the business of selling tangible personal property for use . . . A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

7. "Retailer maintaining a place of business in this state", or any like term, shall mean any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, whether such place of business or agent is located in the state permanently or temporarily, or whether or not such retailer or subsidiary is authorized to do business within this state. . . . It also includes every person who engages in

regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave or other communication system for the purpose of effecting retail sales of tangible personal property.

8. "Tangible personal property" means:

a. Tangible goods, . . . when furnished or delivered to consumers or users within this state.

. . .

9. "Use" shall mean the exercise by any person of any right or power over tangible personal property incident to the ownership or possession of that property, . . .

Sec. 57-40.2-02.1. Use tax imposed.

1. Except as otherwise expressly provided . . . an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of five percent of the purchase price of the property. . .

Sec. 57-40.2-05. Evidence of use. For the purpose of the proper administration of this chapter, and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

Sec. 57-40.2-06. Payment of tax. The tax imposed by this chapter shall be paid in the following manner:

1. The tax upon tangible personal property which is sold by a retailer maintaining a place of business in this state, . . . shall be collected by the retailer and remitted to the commissioner as provided by section 57-40.2-07, . . .

2. The tax, when not paid in conformity with subsection 1 of this section, shall be paid to the tax commissioner directly by any person storing, using, or consuming such property within this state, pursuant to the provisions of section 57-40.2-07.

Sec. 57-40.2-07. Collection of use tax. The tax imposed by this chapter shall be collected in the following manner:

1. Except as otherwise provided . . . every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted . . . before making any sales shall obtain a permit from the commissioner to collect the tax imposed by this chapter, which permit shall be subject to all of the requirements, conditions, and fees for its issuance that apply with respect to a retail sales tax permit, and at the time of making such sales, whether within or without the state shall . . . collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the commissioner, by regulation, shall require such receipt. Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of each of his distribution or sales houses or offices or other places of business in this state.

* * *

3. The tax required to be collected, and any tax collected, by any retailer under subsections 1 and 2 of this section shall constitute a debt owed by the retailer to this state.

4. . . . each retailer required or authorized, pursuant to this section, to collect such tax shall pay the tax in quarterly installments on or before the last day of the month next succeeding each quarterly period ending March thirty-first, June thirtieth, September thirtieth, and December thirty-first of each year. . . . Every retailer, at the time of making the return required by this chapter, shall compute and pay to the commissioner the tax due for the preceding period.

5. . . . the retailer, on or before the last day of the month following the close of the first quarterly period as defined in subsection 4 of this section, and on or before the last day of the month following each subsequent quarterly period of three months, shall make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the tax commissioner may require to enable him correctly to compute and collect such tax, but the tax commissioner, upon receipt of a proper showing by any retailer of the necessity therefor, may grant unto such retailer an extension of time not to exceed thirty days for making such return. . . The commissioner, if he deems it necessary or advisable in order to insure the payment of the tax, . . . may require returns and payment of the tax to be made for annual periods or other than quarterly periods, . . . A return shall be signed by the taxpayer or his duly authorized agent and shall contain a written declaration that it is made and subscribed under penalties of this chapter.

6. . . . any person who uses any property upon which the said tax has not been paid, either to the retailer or directly to the tax commissioner, shall be liable therefor, and, on or before the last day of the month next succeeding each quarterly period, shall pay the tax upon all such property used by him during the preceding quarterly period, in such manner and accompanied by such returns as the commissioner shall prescribe.

* * *

8. The commissioner, when in his judgment it is necessary and advisable to do so in order to secure the collection of such tax, may require any person subject to the tax to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the commissioner of insurance as to solvency and responsibility, in such

amount as the commissioner may fix, to secure the payment of any tax or penalties due or which may become due from such person. In lieu of such bond, securities approved by the tax commissioner, in an amount which he may prescribe, may be deposited with him, and such securities shall be kept in the custody of the commissioner, . . .

Sec. 57-40.2-07.1. Deduction to reimburse retailer for administrative expenses.

1. A retailer who pays the estimated tax due under section 57-40.2-07 within the time limitations prescribed may deduct and retain one and one-half percent of the tax due.

* * *

3. The deduction allowed retailers by this section is to reimburse retailers for expenses incurred in keeping records, preparing and filing returns, remitting the tax, and supplying information to the commissioner upon request.

Sec. 57-40.2-08. Unlawful advertising. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer, or user, directly or indirectly, that the tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded.

Sec. 57-40.2-09. Records required. Each retailer required or authorized to collect the tax imposed by this chapter, and each person using in this state tangible personal property purchased shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require and each such retailer or person shall preserve for a period of three years and three months all invoices and other records of such tangible personal property purchased for resale or for use. The commissioner, or any duly authorized agent, may examine the books, papers, records, and equipment of any person who sells tangible personal property or who is liable for such tax, and may investigate the character of the business of

any such person to verify the accuracy of any return made, or if no return was made, to ascertain and determine the amount due. Any such books, papers, and records shall be made available within this state for such examination upon reasonable notice if the tax commissioner shall make an order to that effect.

Sec. 57-40.2-10. Revocation of permit and authority to do business. If any retailer maintaining a place of business in this state, or authorized to collect the tax imposed by this chapter, fails to comply with any of the provisions of this chapter, or with any order or regulation of the commissioner, the commissioner, by order, may revoke the permit, if any was issued to such retailer . . . Any order shall be made under this section only after a retailer has had an opportunity, upon ten days' notice of the time, place, and purpose of a hearing, to show cause why such order should not be made. The tax commissioner may issue a new permit after a revocation.

Sec. 57-40.2-12. Unlawful sale or soliciting. No agent, canvasser, or employee of any retailer, not authorized by permit from the commissioner of this state, shall collect the tax as prescribed by this chapter, nor sell, solicit orders for, nor deliver, any tangible personal property in this state.

Sec. 57-40.2-13. Provisions of sales tax law applicable. The provisions of chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter.

Sec. 57-40.2-15. Penalties—Offenses.

1. Any person failing to file a return or corrected return or to pay any tax imposed pursuant to this chapter, within the time required by this chapter, is subject to a penalty of five percent of the amount of tax due or of five dollars, whichever is greater, plus interest of one percent of the tax for each month or fraction of month except the first month after the return or the tax became due. Any person on a monthly filing schedule with seven

to fourteen delinquent original returns or payments, and any person other than a monthly filer with four to eight delinquent original returns or payments, is subject to a penalty of ten percent of the tax due or twenty-five dollars, whichever is greater, plus interest of one percent of the tax per month or fraction of a month of delay except the first month after the return or tax became due. Any person on a monthly filing schedule with fifteen or more delinquent original returns or payments, and any person other than a monthly filer with nine or more delinquent original returns or payments, is subject to a penalty of fifteen percent of the tax due or one hundred dollars, whichever is greater, plus interest of one percent of the tax due per month or fraction of a month of delay except the first month after the return or tax became due. The commissioner, if satisfied that the delay was excusable, may waive, and if paid, refund all or any part of the penalty and interest. The penalty and interest must be paid to the commissioner and disposed of in the same manner as the tax with respect to which it is attached. Unpaid penalties and interest may be enforced in the same manner as is the tax.

* * *

3. The certificate of the commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof.

4. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property subject to the tax imposed under the provisions of this chapter, shall be guilty of a class A misdemeanor.

Sec. 57-40.2-15.1. Corporate officer liability. If a corporation holding a permit issued pursuant to the provisions of this chapter fails for any reason to file the required returns or to pay the tax due, any of its officers having control, or supervision of, or charged with the responsibility for making such returns and payments shall

be personally liable for such failure. The sum due for such a liability may be assessed and collected pursuant to the provisions of this chapter for the assessment and collection of other liabilities.

Sec. 57-40.2-16. Lien of tax—Collection—Action authorized.

1. Whenever any person liable for payment to the commissioner of the tax imposed by this chapter or for any penalties in respect thereto refuses or neglects to pay the same the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer, . . .

2. The lien aforesaid shall attach at the time the tax first becomes payable, as provided by section 57-40.2-07, and shall continue until the liability for such amount is satisfied.

* * *

10. Remittances on account of tax due under this chapter shall not be deemed or considered payment thereof unless or until the commissioner shall have collected or received the amount due for such tax in cash or equivalent credit.

Sec. 57-40.2-17. Disposition of excess tax collections. Whenever a retailer maintaining a place of business in this state has collected a use tax from a customer in excess of the amount prescribed or due under this chapter, and if the retailer does not refund the excessive tax collected to the customer, the amount so collected by the retailer shall be paid by the retailer to the commissioner in the quarterly period in which the excessive collection occurred. If the excessive collection is subsequently refunded by the retailer to the customer, the retailer may deduct, as a credit against his use tax liability on the next return that he is required to file, the amount of use tax properly refunded to the customer. . .

NORTH DAKOTA
CHAPTER 57-39.2
SALES TAX ACT

Section 57-39.2-01. Definitions. The following words, terms, and phrases . . . have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

1. "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

* * *

3. "Gross receipts" means the total amount of sales of retailers, valued in money, whether received in money or otherwise. . .

* * *

7. "Retail sale" or "sale at retail" means the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; . . . the delivery of possession within the state of North Dakota of tangible personal property by a wholesaler or distributor to an out-of-state retailer who does not hold a North Dakota retail sales tax permit . . . may not be considered a taxable sale if such delivery of possession would not be treated as a taxable sale in that state. . .

* * *

9. "Sale" means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatever, for a consideration. . .

NORTH DAKOTA
ADMINISTRATIVE PROVISIONS INVOLVED

N.D. Admin. Code §81-04.1-01-03.1. Definitions. Any person having nexus in North Dakota and making taxable sales in or making taxable sales having a destination in North Dakota must obtain a North Dakota sales and use tax permit from the tax commissioner and collect and remit tax on these sales.

For purposes of implementing subsection 8 of North Dakota Century Code section 57-39.2-01 and subsection 5 of North Dakota Century Code section 57-40.2-01, unless the context otherwise requires:

1. "Advertisement" means any message by which a retailer solicits retail sales of tangible personal property. It includes but is not limited to:

   a. Each transmittance, by United States mail, common carrier or otherwise, of a printed sales solicitation message in the form of a bulk mailing or bulk delivery, a sales catalog, brochure, advertising flier, billing or package insert or similar publication or device.

   b. Each transmittance of a sales solicitation message by space advertising in a newspaper, magazine or other publication, which is local, regional, or national in nature.

   c. Each transmittance of a sales solicitation message by radio, television, telephone, telegraph, computer data base, or by cable, optic, microwave or other electronic means, or by any other communications means.

2. "Destination" means the location to which the delivery of tangible personal property is made by a retailer or retailer's agent.

3. "Regular or systematic solicitation" means three or more separate transmittances of any advertisement or advertisements during a testing period.

4. "Separate transmittance" means any transmittance of an advertisement during any twenty-four hour period.

5. "Solicitation" means:

   a. Offering, by advertisement, to make a taxable sale with a destination in North Dakota.

   b. Inviting offers to purchase tangible personal property for delivery in North Dakota.

6. "Taxable sale" means a sale made by a retailer or a retailer maintaining a place of business in this state to purchasers for final use or consumption and not for resale or processing.

7. "Testing period", with respect to the determination of whether a person is required to obtain a permit and collect use tax as a retailer for tax periods commencing on or after the effective date of this section, means the twelve month period ending on September thirtieth of the preceding calendar year.

CHAPTER 851

HOUSE CONCURRENT RESOLUTION NO. 3083
(Representatives Hoffner, Kloubec)
(Senator Nething)
(Approved by the Committee on Delayed Bills)

MAIL ORDER SALES TAX IMPOSITION

A concurrent resolution urging the Congress of the United States to enact legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies.

WHEREAS, in 1967 the Supreme Court of the United States, in its decision in *National Bellas Hess v. Illinois Department of Revenue*, ruled that states may not require collection of sales taxes or use taxes on mail order sales to residents of the state by certain out-of-state mail order companies; and

WHEREAS, the Supreme Court of the United States has acknowledged that the Congress of the United States has power to overturn its ruling and require firms to collect and remit states' sales and use taxes; and

WHEREAS, out-of-state mail order companies selling products within a state are in direct competition with state retailers; and

WHEREAS, state retailers contribute to the support of local governmental and educational services through payment of state and local taxes while out-of-state retailers contribute nothing to local governmental and educational services but compete in the same market with a considerable competitive advantage provided by the Supreme Court decision exempting them from sales and use taxes; and

WHEREAS, the Advisory Commission on Intergovernmental Relations estimates that in 1985 states lost nearly $1.5 billion in sales and use tax revenue by being prohibited from enforcing collection of sales and use taxes on certain out-of-state retailers, and it is likely that this revenue loss will continue to grow unless the United States Congress takes remedial action;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the Fiftieth Legislative Assembly urges the Congress of the United States to approve legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies; and

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the chairmen of the House Committee on Ways and Means and the Senate Committee on Finance, and to each member of the North Dakota Congressional Delegation.

Filed April 2, 1987

1987 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3083

House Committee on FINANCE & TAXATION

Subcommittee on _____ Identify and check when appropriate

Conference Committee _____

Hearing Date 3-11-87

Tape Number 1 /Side A x B Meter # 50

Committee clerk signature JANICE STEN

Minutes:

REP. HOFFNER, DIST 32. Introduced HCR 3083. Recently, in a leadership meeting in Washington, one of the issues at the National Conference of State Legislators was recommending, that we go back home and grant legislation or resolutions urging Congress to enact legislation to impose a state sales and use tax on mail order sales to purchasers within a state to out of state mail companies.

The house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive impact on the state of about 14.1 million dollars. The state can only realize that revenue if Congress passes this kind of legislation. I think there is a lot of fairness in this.

I had a chance to visit with members of Congressman Dorgan's office and Congressman Dorgan had introduced legislation so had Rep. Brooks of Texas, so there is legislation currently before the Congress to allow states to

collect this tax. They all stated that support from the states will go a long way to getting this passed. There appears to be a concensus that it will be more likely to pass this session then any previous session. More of the power brokers are looking at this in a very serious way. I would hope the committee would look favorably on this.

REP. HAUSAUER TO WALT STACK. A bill we had earlier pertaining to this, has that passed the senate?

WALT STACK Yes, it has passed the senate, it is now in the governor's office. It does carry an emergency clause so it will become effective as soon as the governor signs it.

REP. HANSON Do we have any firms in the state which this would affect the other way?

WALT STACK Yes, there are some out there, from time to time our office does get calls indicating they are in a small mail order business and that they do a lot of mailing out of state. They might also be affected.

The bills that are in the federal congress all carry a minimum amount that needs to be done. So none of the very small people would be affected at all.

With no further testimony, the hearing was closed.

COMMITTEE ACTION 3-11-87

REP. ANDERSON made a motion for a Do Pass. REP. DE MERS second the motion. Motion carried and was placed on the consent calendar.

14 Yes 0 No 3 Absent

TESTIMONY BEFORE THE HOUSE FINANCE AND TAXATION COMMITTEE

M. K. HEIDI HEITKAMP,
STATE TAX COMMISSIONER

January 13, 1987

Chairman Hausauer, Committee Members: HB 1195 is part of the Tax Department's continuing effort to stop the sales and use tax loss, caused by the decision in *National Bellas Hess vs. Department of Rev.*, 386 U.S. 753, 87 S.Ct. 1389 (1967), from out-of-state mail orders and to help prevent unfair competition against businesses located in this state.

In *National Bellas Hess*, the United States Supreme Court held that the State of Illinois had no power to impose a use tax liability on an out-of-state mail order firm where the mail order firm maintained no office, had no agents or solicitors, owned no property, and had no telephone listing in Illinois, and where all contacts which the firm had with the state were via United States mail or common carrier. The Court considered this assessment effort an interference with interstate commerce.

The decision continues to allow out-of-state direct marketers and border sellers to refuse to collect "use" taxes from buyers and remit the tax to the home state and/or city of the purchaser. Though consumers who buy from out-of-state businesses are legally liable for "use" taxes, the cost of collection from all but the largest buyers far exceeds the revenue recovered. Consequently states and cities receive little of the amount owed in use taxes. Public awareness of the use tax has remained low in the absence of an effective collection system. Most of the 46 states (including the District of Columbia) with a sales

tax (on in-state purchases) also impose a use tax on purchases by their residents in another state.

THE EXPLOSION IN UNTAXED, OUT-OF-STATE FIRMS

Sales by firms covered by the Supreme Court decision have mushroomed in the last five years. These untaxed, out-of-state firms fall into two broad categories: (1) direct marketers, and (2) border sellers.

Direct marketers are those whose solicitation methods include mail-order catalogs, telephone selling, direct-response commercials, advertising inserts, computer shopping, and other high-tech methods. They run a $150-billion-a-year business accounting for *14 percent of all retail sales*. By 1990, direct marketers will control 20 percent of retail sales, according to the Direct Marketing Association (DMA). It says 6 billion copies of 6,500 direct mail catalogs were sent to U.S. homes in 1985—more than double the figure of five years ago—and an average of 80 catalogs per home. Four of five mail-order catalog purchases are placed by phone, the DMA reports. The independent Advisory Commission on Intergovernmental Relations (ACIR) estimated that the mail-order catalog business grossed $44- to $70-billion in 1985.

Border sellers, usually located just across city or state lines, thrive on the differences in sales tax rates. Located near the borders of adjacent jurisdictions, they ship products across state lines, enabling consumers to avoid sales tax on even routine purchases. Since out-of-state border sellers aren't obligated to cooperate with tax officials from other states, it is difficult to collect use taxes. The increasing reliance of some jurisdictions on sales taxes has increased the revenue loss caused by border sellers.

REVENUE LOSSES TO CITIES AND STATES

Out-of-state businesses threaten the future of the sales tax, which is the second most important state revenue source, accounting for one of every three general fund state tax dollars. Fourteen states rely on sales taxes for more than 40 percent of their revenues. Seven states—including Florida, Texas, Washington and West Virginia—depend on sales taxes for more than half their revenues. Only Alaska, Delaware, Montana, New Hampshire and Oregon impose no sales taxes. In the 46 states (including the District of Columbia) imposing sales taxes, rates range from 2.5 to 7.5 percent. The number of cities imposing sales taxes has shot up 43 percent in the last five years, from 4,462 to 6,397.

The increasing popularity of direct marketers and border sellers is eroding the sales tax base. From 1974 to 1984, the median state sales tax rose from 3.8 to 4.4 percent. In that period, 29 states raised their tax rate and only one cut its rate. City and state tax administrators face frequent projected revenue shortfalls. Much of the problem is out-of-state firms and their tax-free 14 percent share of retail sales. According to ACIR, states and cities will lose $667 million to $1.57 billion in 1985 to out-of-state direct marketers and border sellers. ACIR estimates that 38 of the 46 sales tax states lost at least $10 million each in sales tax revenues in 1985.

State tax officials and retailers are also concerned that the loss of tax revenue from out-of-state businesses is exacerbating the worst elements of the sales tax. Those who do not have access to these non-taxable sales schemes bear a larger share of the sales tax burden, thus increasing the regressiveness of the sales tax.

UNFAIR COMPETITION FROM UNTAXED, OUT-OF-STATE FIRMS

The fate of the sales tax interests others than just state tax officials. Economists Ronald C. Fisher of Michigan State and John Mikesell of Indiana University estimate that a 1 percent increase in a sales tax rate may reduce local retail sales 6 percent, as consumers find ways to beat the tax. These sales losses to Main Street merchants are gains for direct marketers and border sellers.

This unfair advantage for untaxed, out-of-state firms threatens the future of Main Street America. Retailers and tax administrators are caught in a vicious cycle: Higher sales tax rates are chasing more customers to out-of-state firms, who have a price advantage equal to the tax rate of the customer's home city or state. The "discount" ranges from 2.5 to more than 8 percent. ACIR concludes that the "virtual tax immunity" of out-of-state firms send customers to direct marketers and border sellers.

FEDERAL LEGISLATION FOR FAIRNESS IN SALES TAXES

U.S. Representative Jack Brooks introduced a bill in the last Congress to correct the problem *National Bellas Hess* created. H.R. 5021, the Equity in Interstate Competition Act, requires retailers who regularly solicit customers in another state to report their collections quarterly. The bill contained a *de minimus* rule which provided that only those out-of-state businesses with at least $12.5 million in sales nationwide or $500,000 to residents of a given state would have to remit taxes to that state. The bill also mandates a single state tax rate, regardless of additional local taxes, for purposes of interstate collections. Representative Brooks' bill enjoys the strong support of the Na-

tional Association of Tax Administrators and the Multistate Tax Commission. ACIR has endorsed its components.

The 100th Congress will undoubtedly consider similar bills requiring the remittance of use taxes by mail order retailers.

HB 1195 accomplishes two things. First, it clarifies that it is the intent of the Legislature that mail order sales be subject to the sales and use tax. This clarification allows the State Tax Department to pursue mail orders without fear that a court will reject the claim because the tax is not based broad enough. Second, this Bill prepares the State for immediate implementation of any federal legislation.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE:
MILTON L. SCHWARTZ, JUDGE

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DIRECT MARKETING,	)	
	)	
Plaintiff,	)	
vs.	)	NO. Civ S-88-1067
	)	
BENNETT, et al.,	)	
	)	
Defendants.	)	

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REPORTER'S TRANSCRIPT

JUNE 28, 1991

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Reported by: JANE E. BEAUCHAMP, CSR #6408

APPEARANCES:

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SACRAMENTO, CALIFORNIA,
FRIDAY, JUNE 28, 1991

2:00 P.M.

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THE COURT: The following constitutes the decision of the Court on these cross-motions for summary judgment.

Plaintiff, Direct Marketing Association, Inc., filed this section 1983 action on behalf of its members seeking declaratory and injunctive relief.

The controversy arose when defendants, individual members and officers of the California Board of Equalization demanded that plaintiff's members collect a use tax from their California customers if they, one, maintain substantial and recurring solicitations of and sales to California customers; and two, accept credit cards issued by California financial institutions. Plaintiff contends that imposition of use tax liability in this case is unconstitutional because there is an insufficient connection between California and the members it seeks to tax.

The Supreme Court has held that under the due process clause of the 14th amendment and the commerce clause, a state may not impose the burden of use tax collection against an out-of-state entity unless there is a sufficient nexus between the state and the entity. National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 754 (1967). In applying that rule, the Court has found a sufficient nexus where the out-of-state entity has a place of business, employees or property within the state. It has found the nexus insufficient where the only connection with customers in the taxing state is by common carrier or the United States mail.

According to the facts presented to the Court by stipulation of all parties in this case, plaintiff's members do not have offices, outlets, stores, warehouses or other facilities, stocks of goods, real property or employees in California. They do not have agents, independent contractors, or representatives soliciting sales in California. They do not maintain bank accounts in California. They do not ship products to California customers from any location in California. Plaintiff contends that in light of these facts, the Supreme Court's holding in National Bellas Hess compels this Court to rule that defendant's imposition of use tax liability is unlawful.

Defendants, however, contend that plaintiff interprets the sufficient nexus test too narrowly. According to defendants, there is sufficient nexus in this case because plaintiff's members accept credit cards issued by California financial institutions. The parties agree that a substantial portion of the credit card sales to California customers are charged to the customers' VISA and MasterCard credit cards issued by California banks. Defendants argue that other factors also weigh in favor of a finding of nexus, including the fact that defendants' advertisements and catalogues generate literal garbage which must be disposed of by the state, and the fact that sales to California residents require California 800 line telephone calls, debt collection in this state, and frequent shipments to California on state highways.

Defendants also contend that a rigid application of the doctrine articulated in National Bellas Hess is improper for several reasons. They contend that because the direct marketing industry has grown dramatically since National Bellas Hess was decided in 1967, the doctrine of that case is obsolete. They also contend that since the Supreme Court has expanded its notion of what constitutes "minimum contacts" with respect to personal jurisdiction, it is

reasonable to assume that the Court is moving in the same direction with respect to sufficient nexus and use tax liability.

This Court does not find these arguments persuasive. The Court does not find use of California financial institutions or any of the other factors mentioned by defendants to be comparable to the maintenance of retail outlets, employees, or property within the State. Additionally, although the direct marketing industry may have only been a fraction of its current size at the time the case was decided, the sales transactions which took place between Bellas Hess and its Illinois customers clearly required reliance on Illinois financial institutions. The dissent found this significant in terms of meeting the sufficient nexus test, but clearly the majority did not.

Furthermore, defendants contend that International Shoe Company vs. Washington, 326 U.S. 310 (1945), stands for the proposition that the test for minimum contacts is or should be interchangeable with the test for sufficient nexus. The Court finds that this conclusion or reading of International Shoe is erroneous. Although the Court stated that the activities of the taxpayer in the taxing state subject it alike to taxation by the state and to suit to recover the tax, the Court's ruling was limited to the facts before it. Of course, the factors which are relevant to a determination of minimum contacts may also be relevant to a determination of sufficient nexus. Nonetheless, the two doctrines are distinct.

Defendants additionally argue that during the short time prior to customer acceptance, the goods plaintiff's members shipped to California residents remain the property of the members. Defendants conclude that because this property enjoys California police and fire protection, plaintiff's members are receiving a benefit from the state which justifies imposition of use tax liability. The Court

does not agree with this analysis. Title to the goods in question remains with the seller only where the sales are sales on approval pursuant to Uniform Commercial Code Section 2-326. There is no evidence or facts before the Court indicating the sales by plaintiff's members are on approval. The general presumption runs against delivery to a customer being a sale on approval. Gold 'N Plump Poultry, Inc. vs. Simmons Engineering Company, 805 Federal Second 1312 (Eighth Circuit 1988). In any event, a ruling in favor of plaintiff on this motion would not preclude defendants from imposing a use tax against an out-of-state retailer who maintained property in this state.

In sum, although defendants have raised a number of meritorious arguments as to why National Bellas Hess should be reconsidered or reversed or modified, this Court feels it is still bound by it. Consequently, the Court concludes that in the absence of a clearly distinguishing feature, defendants cannot lawfully require plaintiff's members to collect and remit a use tax on sales to California customers solely on the basis that those members maintain substantial and recurring solicitations and sales to California customers and accept credit cards issued by California financial institutions. Accordingly, the Court is compelled to grant plaintiff's motion for summary judgment and does do so hereby and denies defendants' cross-motion for summary judgment.

MR. ISAACSON: The only question I have, since summary judgment is being entered, it resolves all the issues in the case, is judgment also being entered in plaintiff's favor?

THE COURT: That follows the granting of the motion for summary judgment.

Also, the affidavit of Stephen Clegg filed on behalf of plaintiff on June 21, 1991, is stricken.

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CERTIFICATE OF COURT REPORTER

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I, JANE E. BEAUCHAMP, Official Reporter, certify that the foregoing pages constitute a true and correct transcript of the testimony contained therein as reported by me and thereafter reduced to typewriting to the best of my ability.

July 2, 1991.

[Signed]

JANE E. BEAUCHAMP, CSR #6408
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIRECT MARKETING, ASSOCIATION INC.,	)	No. CIVS-88-1067 MLS
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
v.	)	
WILLIAM M. BENNETT, et al.,	)	
Defendants.	)	

This matter came on for hearing on June 28, 1991, on the motion of Plaintiff DIRECT MARKETING ASSOCIATION, INC. for summary judgment and the cross-motion of Defendants WILLIAM M. BENNETT, et al. for summary judgment. Plaintiff was represented by George Isaacson of Brann & Isaacson and John A. Mendez of Downey, Brand, Seymour & Rohwer. Defendants were represented

by Steven J. Green, Deputy Attorney General, State of California.

The Court, having read and considered the motions, memoranda of points and authorities, stipulated facts, and affidavits submitted both in favor and in opposition thereto, and having heard the oral arguments of counsel, rendered its decision granting Plaintiff's motion for summary judgment and denying Defendants' cross-motion for summary judgment, in open court at the conclusion of the hearing. A transcript of the Court's decision is attached hereto and incorporated herein by reference. Good cause appearing therefor:

IT IS ORDERED that Plaintiff's motion for summary judgment in the above-captioned action is GRANTED.

IT IS FURTHER ORDERED that Defendants' cross-motion for summary judgment in the above-captioned action is DENIED.

Dated: July 12, 1991.

[Signed]

MILTON L. SCHWARTZ
U.S. DISTRICT COURT JUDGE

FEDERAL AND STATE CASES CITING *NATIONAL BELLAS HESS*

Federal Cases:

Goldberg v. Sweet, 488 U.S. 252 (1989).

D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988).

ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307 (1982).

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).

Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980).

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980).

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978).

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).

Direct Marketing Association v. Bennett, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1683 (1991).

National Meat Association v. Deukmejian, 743 F.2d 656 (9th Cir. 1984), *aff'd*, 469 U.S. 1100 (1985).

Aldens, Inc. v. La Follette, 552 F.2d 745 (7th Cir. 1977).

Aldens, Inc. v. Packel, 524 F.2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

Evanston Insurance Company v. Merin, 598 F. Supp. 1290 (D.N.J. 1984).

Strescon Industries, Inc. v. Cohen, 508 F. Supp. 786 (D. Md. 1981), *aff'd*, 664 F.2d 929 (4th Cir. 1981).

Aldens, Inc. v. Miller, 466 F. Supp. 379 (S.D. Iowa 1979), *aff'd*, 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980).

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Direct Marketing Association v. Bennett, No. Civ. S-88-1067 (E.D. Cal. June 28, 1991).

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Boswell v. Paramount Television Sales, Inc., 291 Ala. 490, 282 So.2d 892 (Ala. 1973).

White v. Kimberly-Clark Corporation, 503 So.2d 296 (Ala. Civ. App. 1986), *aff'd*, 503 So.2d 304 (Ala. 1987).

State of Alabama v. Newbern, 239 So. 2d 780 (Ala. Civ. App. 1970), *cert. denied sub nom. Newbern v. State of Alabama*, 288 Ala. 747, 264 So.2d 1909 (Ala. 1972).

Illinois Commercial Men's Ass'n v. State Board of Equalization, 34 Cal.3d 839, 671 P.2d 349, 196 Cal. Rptr. 198 (Cal. 1983), *appeal dismissed*, 466 U.S. 933 (1984).

Montgomery Ward & Co. v. State Board of Equalization, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (Cal. Ct. App. 1969), *cert. denied*, 396 U.S. 1040 (1970).

Sturbridge Yankee Workshop, Inc. v. State Bd. of Equalization, No. 512584 (Sacramento Superior Ct., Cal. January 29, 1991).

Land's End, Inc. v. California State Bd. of Equalization, No. 620135 (San Diego Superior Ct., Cal. 1991).

Associated Dry Goods Corporation v. City of Arvada, 197 Colo. 491, 593 P.2d 1375 (Colo. 1979).

SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666 (1991) *cert. denied sub nom. Commissioner of Revenue v. SFA Folio Collections, Inc.*, 59 U.S.L.W. 3838 (U.S. 1991).

Cally Curtis Co. v. Groppo, 214 Conn. 292, 572 A.2d 302 (Conn. 1990), *cert. denied*, 111 S.Ct. 77 (1990).

Roger Dean Enterprises, Inc. v. State Department of Revenue, 387 So.2d 358 (Fla. 1980).

L. M. Berry & Company v. Blackmon, 231 Ga. 659, 203 S.E.2d 520 (Ga. 1974).

Independent Publishing Company v. Hawes, 119 Ga.App. 858, 168 S.E.2d 904 (Ga. Ct. App. 1969).

Allemed, Inc. v. Department of Revenue, 101 Ill. App.3d 746, 428 N.E.2d 714 (Ill. App. 1981).

Reader's Digest Association v. Mahin, 44 Ill.2d 354, 255 N.E.2d 458 (Ill. App.), *cert. denied*, 399 U.S. 919 (1970).

Gross Income Tax Division v. P.F. Goodrich Corp., 260 Ind. 41, 292 N.E.2d 247 (Ind. 1973).

Evansville-Vanderburgh Airport Authority Dist. et al. v. Delta Airlines, Inc. et al., 225 Ind. 436, 265 N.E.2d 27 (Ind. 1970), *rev'd*, 405 U.S. 707 (1972).

Good's Furniture House, Inc. v. Iowa State Bd. of Tax, 382 N.W.2d 145 (Iowa 1986), *cert. denied*, 479 U.S. 817 (1986).

Corning Laboratories, Inc. v. Iowa State Department of Revenue, 270 N.W.2d 463 (Iowa 1978).

Sabine Pipe & Supply Company v. McNamara, 411 So.2d 1167 (La. App. 1982).

Parish of St. Mary Sales and Use Tax Department v. Texad, Inc., 271 So.2d 549 (La. App. 1972).

Burke & Sons Oil Co. v. Director of Revenue, 757 S.W.2d 278 (Mo. App. 1988).

Northwest Airlines, Inc. v. Joint City-County Airport Board, et al., 154 Mont. 352, 463 P.2d 470 (Mont. 1970).

Avco Financial Services Consumer Discount Company One, Inc. v. Director, Division of Taxation, 100 N.J. 27, 494 A.2d 788 (N.J. 1985).

Roadway Express, Inc. v. Director, Division of Taxation, 50 N.J. 471, 236 A.2d 577 (N.J. 1967), *appeal dismissed*, 390 U.S. 745 (1968).

Thomson-Leeds Co. v. Taxation Division Director, 8 N.J. Tax 24 (N.J. Tax Ct. 1985).

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S.M.Z. Corporation v. Director, Division of Taxation, 5 N.J. Tax 232 (N.J. Tax Ct. 1982), *rev'd*, 193 N.J. Super. 305, 473 A.2d 982 (1984).

CIT Financial Services Consumer Discount Co. v. Director, Division of Taxation, 4 N.J. Tax 568 (N.J. Tax Ct. 1982).

The Tuition Plan of New Hampshire v. Director, Division of Taxation, 4 N.J. Tax 470 (N.J. Tax Ct. 1982).

Ringgold Coal Mining Company v. Taxation Division Director, 4 N.J. Tax 321 (N.J. Tax Ct. 1982).

Glick Studios, Inc. v. Director, Division of Taxation, 2 N.J. Tax 365 (N.J. Tax Ct. 1981).

Proficient Food Company v. New Mexico Taxation and Revenue Department, 107 N.M. 392, 758 P.2d 806 (N.M. App. 1988).

Advance Schools, Inc. v. Bureau of Revenue, 89 N.M. 133, 548 P.2d 95 (N.M. App. 1975).

Aldens, Inc. v. Tully, Jr. et al., 70 A.D.2d 720, 416 N.Y.S.2d 425 (N.Y. App. Div. 1979), *aff'd*, 49 N.Y.2d 525, 404 N.E. 708 (N.Y. 1980), *appeal dismissed*, 449 U.S. 802 (1980).

Society of the Plastics Industry, Inc., et al. v. City of New York 68 Misc.2d 366, 326 N.Y.S.2d 788 (N.Y. App. Div. 1971).

Book-of-the-Month Club, Inc. v. Porterfield, 25 Ohio St. 2d 277, 268 N.E.2d 272 (Ohio 1971).

Plowden & Roberts Inc. v. Porterfield, 21 Ohio St. 2d 276, 257 N.E.2d 350 (Ohio 1970).

Alaska Airlines, Inc. v. Department of Revenue, 307 Or. 406, 769 P.2d 193 (Or. 1989), *cert. denied*, 110 S.Ct. 717 (1990).

Kulick v. Department of Revenue, 290 Or. 507, 624 P.2d 93 (Or. 1981), *appeal dismissed*, 454 U.S. 803 (1981).

Budget Rent-A-Car, Inc. v. Multnomah County, 287 Or. 93, 597 P.2d 1232 (Or. 1979).

Briggs & Stratton Corporation v. Commission, 3 Or.T.R. 174 (Or. T.C. 1968).

Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania, 567 A.2d 773 (Pa. Commw. 1989) *aff'd per curiam*, ___ A.2d. ___ (Pa. 1991).

Alan Wood Steel Company v. School Dist. of Philadelphia, 425 Pa. 455, 229 A.2d 881 (Pa. 1967).

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L.L. Bean, Inc. v. Commonwealth of Pennsylvania, 101 Pa. Commw. 435, 516 A.2d 820 (Pa. Commw. 1986).

Pearle Health Services, Inc. v. Taylor, 799 S.W.2d 655 (Tenn. 1990).

Cook Export Corporation v. King, 652 S.W.2d 896 (Tenn. 1983).

SFA Folio Collections, Inc. v. Huddleston, No. 89-3015-III (Davidson County Chancery Ct. Tenn. March 11, 1991).

Bloomingdale's By Mail, Ltd. v. Huddleston, No. 89-3017-II, (Davidson County Chancery Ct. Tenn. March 8, 1991), *appeal filed*, No. 01-S-01-9016-CH-00047 (Tenn. Sup. Ct. 1991).

Bullock v. Foley Brothers Dry Goods Corporation, 802 S.W.2d 835 (Tex. Civ. App. 1990).

American Trucking Assns, Inc. v. Conway, 146 Vt. 579, 508 A.2d 408 (Vt. 1986), *cert. denied*, 483 U.S. 1019 (1987).

Rowe-Genereux, Inc. v. Vermont Department of Taxes, 138 Vt. 130, 411 A.2d 1345 (Vt. 1980).

Chicago Bridge & Iron Company v. State Department of Revenue, 98 Wash.2d 814, 659 P.2d 463 (Wash. 1983), *appeal dismissed*, 464 U.S. 1013 (1983).

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J.C. Penney Co., Inc., et al. v. Hardesty, 264 S.E.2d 604 (W.Va. 1979).

National Liberty Life Ins. Company v. State, 62 Wis.2d 347, 215 N.W.2d 26 (Wis. 1974), *cert. denied*, 421 U.S. 946 (1975).